NTSB Order No.
EM-43

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.,
on the 2nd day of April 1975.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

ADELBERT M. MILLS, Appellant

Docket ME-36

OPINION AND ORDER

Appellant is seeking review of a decision of the Commandant[1] affirming the revocation of his seaman's document under authority of 46 U.S.C. 239(b).[2] In the prior action, appellant had appealed to the Commandant (Appeal No. 1985) from the initial decision of Administrative Law Judge James M. Donahue, issued at the conclusion

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[1]Admiral O. W. Siler has succeeded to the office of Commandant, United States Coast Guard, during the pendency of this appeal.

[2] 46 U.S.C. 239b provides, in relevant part, that:
"The Secretary [of Transportation] may:
...(b) take action, based on a hearing before a Coast Guard examiner, under hearing procedures prescribed by the Administrative Procedure Act, as amended to revoke the seaman's document of--
(1) any person who, subsequent to July 15, 1954, and within ten years prior to the institution of the action, has been convicted in a court of record of violation of the narcotic drug laws of the United States, the District of Columbia, or any State or Territory of the United States, the revocation to be subject to the conviction's becoming final...."
The Commandant, by delegation, exercise the authority of the Secretary in cases arising under the statute. 49 CFR 1.46(b); see Commandant v. Snider, 1 N.T.S.B. 2177, Order EM-7, adopted September 24, 1969.

of a full evidentiary hearing.[3] Throughout these proceedings, appellant has been represented by counsel.

The law judge found that, on December 18, 1967, appellant was the holder of a seaman's document and was convicted in the United States District Court for the District of Arizona, a court of record, of violating a narcotic drug law of the United States, namely, 26 U.S.C. 4744(a). He concluded that, because of this conviction, the revocation of appellant's document (MMD No. Z-533-34-3534-D2) was required by 46 U.S.C. 239b; and therefore imposed that sanction.

Two exhibits were offered to prove the conviction, both certified as true copies of the court's records by the duty clerk of court.[4] The first is an indictment showing that appellant was charged in three counts with (1) smuggling 2 pounds, 10 1/2 ounces of marijuana into the United States from Mexico, in violation of 21 U.S.C. 176a; (2) being the transferee of this marijuana and having obtained it without paying the tax thereon, violating 26 U.S.C. 4744(a); and (3) also smuggling seven peyote plants from Mexico, thereby violating 18 U.S.C. 545. These offenses were alleged to have occurred at Nogales, Arizona, on October 3, 1967.[5] The second exhibit, entitled "Order of Probation," recites that appellant appeared with counsel before the court on December 18, 1967, and that, although pleading "Not Guilty," he was convicted of "unlawful possession of marihuana, as charged in Ct. 2, and ... smuggling, as charged in Ct. 3 of the indictment."[6] The imposition of sentence was suspended and appellant was placed on probation for 2 years. The validity and finality of appellant's conviction at the time of its entry, as reflected in these documents, is unchallenged.

In appellant's brief on appeal, it is contended, however, that subsequent rulings of the Supreme Court in other cases involving marijuana transferees prosecuted for violations under section 4744(a) have invalidated his own conviction thereunder, for

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[3]Copies of the decisions of the Commandant and the law judge (then acting as "hearing examiner") are attached hereto. 5 CFR 930, 37 Fed. Reg. 16787, August 19, 1972.

[4] 46 CFR 137.20-105; recodified and reissued as§5.20-105. See 39 Fed. Reg. 3332, 33330, September 17, 1974.

[5]The filing date of the indictment is October 11, 1967.

[6]The law judge held that 46 U.S.C. 239b was inapplicable to the third count, since the Coast Guard presented no "scientific evidence" that peyote is a narcotic drug.

purposes of 46 U.S.C. 239b. In support thereof, he argues that the Court recognized a previously unknown defense which has been applied retroactively to vacate earlier convictions for violating section 4744(a)[7] in virtually all of the Federal judicial circuits, including the 9th Circuit in which he was convicted. He therefore urges that his sanction should be removed to avoid "an absurd result." Counsel for the Commandant has filed a reply brief opposing such relief.

Upon consideration of the parties briefs and the entire record, the Board has concluded that the findings of the law judge, as affirmed by the Commandant, are supported by reliable, probative, and substantial evidence. We adopt their findings as our own. Moreover, we agree that in the absence of a judicial decree vacating appellant's conviction, the sanction imposed under 46 U.S.C. 239b is warranted.

The Supreme Court decisions on which appellant relies are Leary v. United States, 395 U.S. 6 (1968)8 reversing a marijuana transferee's conviction; and United States v. Covington, 395 U.S.57 (1968), the companion case. In LEARY, the Court held that the defendant's privilege against self-incrimination was infringed by the transfer tax provisions of law being enforced through section 4744(a)(2), and that his invocation of the privilege, even though untimely raised on a motion for new trial, "provided a full defense." The Covington decision then recognized this defense in affirming the dismissal of a charge under section 4744(a)(1) where the defendant's motion was based on "a substantial risk of incrimination had he complied with... " the related transfer tax provisions.

Other cases cited by appellant have involved collateral attacks on section 4744(a) convictions obtained prior to the Leary and Covington decisions, where the self-incrimination defense had been waived by a plea of guilty.[8] In those cases, the rationale

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[7]This section was repealed in 1970 by section 1101(b)(3)(A) of P.L. 91-513. There is no appeal from the Commandant's holding that appellant's conviction was not thereby expunged, which is consistent with authority. 1A, Sutherland, Statutes and Statutory Construction §§ 23.26 et seq., (4th ed. 1972).

[8]The following citations, in order of the judicial circuits, are representative: U.S. v. Liquor (2 Cir. 1970) 430 F. 22d 842, cert. den. 402 U.S. 948; Bannister v. U.S. (3 Cir. 1971) 466 F. 2d 1250; Harrington v. U.S. (5 Cir. 1971) 444 F. 22d 1190; Flores v. U.S. (6 Cir. 1973) 472 F. 2d 569, expressly overruling prior decisions of that circuit cited in the Commandant's decision;

for vacating pre-Leary convictions has been that "a guilty plea entered at a time when the defendant could not know of the defense, was not a waiver of it."[9]

In our view, these decisions do not demonstrate the invalidity of appellant's conviction under section 4744(a) but rather that it may be voidable in the convicting jurisdiction. Its voidability would depend on the court's determination of whether he has asserted the constitutional defense in a timely fashion and, perhaps, on whether his conviction of the lesser of two charges involving his marijuana offense and the leniency of his sentence resulted from plea bargaining. Case law indicates that the determination of these questions in appellant's favor is far from being preordained.[10]

Appellant was advised by the initial decision herein to pursue his remedy in court, seeking to vacate the narcotic drug law conviction and thereby remove the instant disability. His counter argument is the such a course of action is inconvenient and would be unnecessary for any other purpose. In our opinion, these were utterly insufficient as reasons for abandoning an appropriate procedure provided by Coast Guard regulations,[11] or for suspending the operation of 46 U.S.C. 239b.

We disagree with the introductory dictum in the Commandant's decision that "Once the charge of conviction for violation of a narcotics drug law has been brought and proof of conviction has been submitted at a hearing, there is no one, not even the

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Santos v. U.S. (7 Cir. 1970) 426 F 22d 244, cert. den. 400 U.S. 911; Hupert v. U.S. (8 Cir. 1971) 448 F. 2d 668; Navarro v. U.S. (9Cir. 1971) 449 F. 2d 113; and Broadus v. U.S. (D.C. Ciir. 1971) 450 F. 2d 639.

[9]Navarro v. U.S., supra.

[10] Gaxiola v. U.S. (9 Cir. 1973) 481 F. 22d 383; Grisham v. U.S. (10 Cir. 1970) 47 F. d 157, cert. den. 400 U.S. 953.

[11]46 CFR 137.20-190(b), cited by the law judge, requires that: "When the proceeding under the provisions of Title 46, U.S. Code, section 239b, is based on a narcotics conviction [which has become final], rescission of the revocation ... will not be considered, unless the applicant submits a specific court order to the effect that his conviction has been unconditionally set aside for all purposes. The Commandant reserves the personal right to make the determination in such case." (See 46 CFR 5.20-190(b), revised as of October 1, 1974.)

Secretary or the Commandant, who can exercise discretion and do less than revoke the seaman's document." The plain language of the statute refutes this view since it provides that "the Secretary [and the Commandant, by delegation] may ... take action ... to revoke ..." Since the permissive word "may" is used instead of the mandatory "shall," we have previously held that "the fair implication to be derived is that such authority was intended to be exercised as a matter of discretion."[12]

Nonetheless, it is apparent to us that the sanctioning power was particularly designed for application to a conviction such as appellant's for his offense involving the unlawful possession of a very large amount of marijuana. This is also borne out by his testimony at the hearing, wherein his sole excuse was that he was procuring it at the request of his college professor for distribution to "around 30" of his classmates.[13] Under these circumstances, we are constrained to find, as in Commandant v. Stuart,[14] that in this instance, "The underlying policy of the statute necessitates [the sanction] ... to avoid the risks of appellant's subsequent involvement with marijuana offenses when serving aboard merchant vessels, to the detriment of shipboard safety, morale, and discipline."

ACCORDINGLY, IT IS ORDER THAT:

1. The instant appeal be and it hereby is denied; and

2. The Commandant's order affirming the revocation of appellant's seaman's document by the law judge, under authority of 446 U.S.C. 239b, be and it hereby is affirmed.

REED, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

(SEAL)

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[12]Commandant v. Moore, NTSB Order EM-39, adopted October 10, 1974.

[13]Tr. 31. The legislative history of 46 U.S.C. 239b clearly evinces the purpose of enabling the Coast Guard to proceed against the seaman's documents of convicted traffickers, which would include such distributors of marijuana as this appellant, although their offenses may have been committed ashore while not serving as seamen. H. R. Rep. No. 1559, 83 Cong. 2d Sess. (1954).

[14]NTSB Order EM-31, adopted October 31, 1973.